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No. ..-....

IN THE

Supreme Court of the United States

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CLERK

October Term, 1981

WILLIAM FISHER,

Petitioner,

vs.

CITY OF TUCSON, an incorporated municipality,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF AMICI CURIAE, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, AMERICAN COALITION OF CITIZENS WITH DISABILITIES, TWENTY-FIVE CALIFORNIA INDEPENDENT LIVING PROGRAMS: HUMBOLDT ACCESS PROJECT; COMMUNITY RESOURCES FOR INDEPENDENCE; NORTHERN CALIFORNIA INDEPENDENT LIVING PROGRAM;

(Cover Continued on Inside Front Cover)

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WILLIAM FISHER,

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BRIEF OF AMICI CURIAE, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, AMERICAN COALITION OF CITIZENS WITH DISABILITIES, AND TWENTY-FIVE CALIFORNIA INDEPENDENT LIVING PROGRAMS.

Interest of Amici.

Amici NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, AMERICAN COALITION OF CITIZENS WITH DISABILITIES, and CALIFORNIA INDEPENDENT LIVING PROGRAMS are all organizations of and for persons with disabilities.

Amicus NATIONAL ASSOCIATION OF PROTECTION & ADVOCACY SYSTEMS is an association of state Protection and Advocacy systems. Under the Developmental Disabilities Act, 42 U.S.C. § 6012, and as a prerequisite for obtaining funds under the Act, each state must have in place an independent system for protecting and

advocating the rights of persons with developmental disabilities. The system must have the authority to pursue legal, administrative and other appropriate remedies on behalf of developmentally disabled persons against the state and others. "Developmental disability" is defined at 42 U.S.C. § 6001(7) as a severe and chronic disability resulting in substantial functional limitations in areas of major life activities and manifest prior to age 22. The state Protection and Advocacy systems are thus mandated to advocate on behalf of the approximately six million persons in the United States who are developmentally disabled.

Amicus AMERICAN COALITION OF CITIZENS WITH DISABILITIES (ACCD) is an umbrella organization of over 100 other organizations of and for persons with disabilities. The organization was founded in 1974 to secure and enforce the civil and human rights of all people with physical or mental disabilities, and to overcome barriers to equal employment opportunities. ACCD and its constituent organizations have worked to implement and enforce § 503 of the Rehabilitation Act of 1973 as amended along with other provisions of Title V of the Rehabilitation Act. Approximately 8 million people are represented directly and indirectly by ACCD.

The twenty-five separate CALIFORNIA INDEPENDENT LIVING PROGRAMS are disabled-run and controlled nonprofit organizations which have as their goals the realization of the right of disabled persons to develop to their potential, to live with dignity and as independently as possible, and to live and contribute in the mainstream of society. Consistent with these goals independent living programs have devoted substantial time and energy to readying people for employment and assisting them in overcoming barriers to employment, including the barrier of employer exclusion on the basis of handicap and employer refusal to

make reasonable accommodation to disability limitations. The CALIFORNIA INDEPENDENT LIVING PROGRAMS (ILP's), and particularly the Berkeley Program, have served as models for the developing consciousness among disabled throughout the country. The California ILP's also served as the model for Title VII of the Rehabilitation Act as amended in 1978, 29 U.S.C. § 796, which title is designed to foster the development of similar programs throughout the country.

Beginning in the north of the State and moving south,

HUMBOLDT ACCESS PROJECT in Eureka works with persons with disabilities in Humboldt County;

COMMUNITY RESOURCES FOR INDEPENDENCE in Santa Rosa works with persons with disabilities in Sonoma County;

NORTHERN CALIFORNIA INDEPENDENT LIVING PROGRAM in Chico works with persons with disabilities in Butte County;

MARIN CENTER FOR INDEPENDENT LIVING in San Rafael works with persons with disabilities in Marin County;

CENTER FOR INDEPENDENCE OF THE DISABLED in Belmont works with persons with disabilities in San Mateo County;

CENTER FOR INDEPENDENT LIVING, INC., in Berkeley, the first independent living program in the United States, works with persons with disabilities in the Bay area;

SAN FRANCISCO INDEPENDENT LIVING PROJECT works with persons with disabilities in San Francisco.

COMMUNITY RESOURCES FOR INDEPENDENT LIVING in Hayward works with persons with disabilities in the southern part of Alameda County including Hayward, San Leandro, Fremont and Livermore;

ADULT INDEPENDENCE DEVELOPMENT CENTER in Campbell works with persons with disabilities in Santa Clara County;

RESOURCES FOR INDEPENDENT LIVING, INC., in Sacramento works with persons with disabilities in Sacramento County and contiguous areas;

COALITION CENTER OF THE DISABLED in Modesto works with persons with disabilities in Stanislaus County;

CAPH (California Association of the Physically Handicapped) SERVICE CENTER in Fresno works with persons with disabilities in Fresno County;

BAKERSFIELD CENTER FOR INDEPENDENT LIVING works with persons with disabilities in Kern County;

INDEPENDENT LIVING RESOURCE CENTER in Santa Barbara works with persons with disabilities in Santa Barbara County;

DARRELL McDANIEL INDEPENDENT LIVING CENTER, INC., in Van Nuys works with persons with disabilities in the San Fernando Valley and in the Burbank and Glendale areas;

EAST SAN GABRIEL VALLEY SERVICES FOR THE DISABLED in West Covina works with persons with disabilities in the San Gabriel Valley;

HANDICAPPED RESOURCE CENTER in Covina works with persons with disabilities in parts of East San Gabriel Valley.

WESTSIDE COMMUNITY FOR INDEPENDENT LIVING, INC., in Los Angeles works with persons with disabilities in the South Bay (Torrance, Hawthorne) area, and in the area west of the Wilshire/Fairfax district in Los Angeles County;

GOOD SHEPHERD CENTER FOR INDEPENDENT LIVING, INC., in Los Angeles works with persons with

disabilities in the 56-mile inner city portion of Los Angeles County;

COMMUNITY REHABILITATION SERVICES in Los Angeles County works with persons with disabilities in the East Los Angeles area;

DISABLED RESOURCES CENTER, INC., in Long Beach works with persons with disabilities in the Long Beach, Lakewood, Signal Hill, Hawaiian Gardens, Bellflower and Paramount areas;

SOUTHEAST CENTER FOR INDEPENDENT LIVING in Downey works with persons with disabilities in the Southeast portion of Los Angeles County which includes some twenty cities such as Downey, Compton, Bell, Bell Gardens, etc.;

DAYLE McINTOSH CENTER FOR THE DISABLED in Garden Grove works with persons with disabilities in Orange County;

ROLLING START in San Bernardino works with persons with disabilities in San Bernardino and Riverside Counties; and

COMMUNITY SERVICE CENTER FOR THE DISABLED in San Diego works with persons with disabilities in San Diego County.

Summary of Argument.

Amici in support of Petitioner Fisher urge this Court to grant his petition for writ of certiorari with respect to *Fisher v. City of Tucson*, 663 F.2d 861 (9th Cir. 1981). The question raised by *Fisher* is an important one: whether there is a private right of action to remedy a federal contractor's violation of § 503 of the Rehabilitation Act, 29 U.S.C. § 793, namely discrimination on the basis of handicap including a refusal to make reasonable accommodation to a

person's disability limitations. The question affects the rights of over 20 million people to equal employment opportunities with respect to about 50% of the private sector jobs. Further, the decision below is premised in large part on an interpretation of the phrase "affirmative action" in § 503 which conflicts with this Court's interpretation of that phrase in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979), and with Congress' interpretation of that phrase as reflected in the 1978 Amendments to the Rehabilitation Act.

Although only a minority of the jobs covered by § 503 are in the public sector (since most federal contracts for goods and services are with private sector companies), an important question is also raised with respect to 42 U.S.C. § 1983 and whether § 1983 is an alternative source of Congressional authorization for private suit under § 503 where, as here, the federal contractor is a "person" within the meaning of 42 U.S.C. § 1983. Although § 1983 was not raised or considered below, it is appropriate for this court to consider § 1983 under the criteria enunciated last term in *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers*, 453 U.S. 1, 19, 101 S.Ct. 2615, 2626, 69 L.Ed.2d 435, 450 (1981). Alternatively, should this Court elect not to consider the 5503 private right of action question, *Amici* suggest that the case may be appropriate for summary disposition by vacating the judgment below and remanding the matter for consideraton in light of *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers, supra*, of *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), and of *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980) with respect to the § 1983 question.

ARGUMENT.

A. The Question of the Availability of a Private Right of Action Under § 503 Is an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court, Because the Decision Below Denies the Nation's Disabled a Remedy for Handicap Discrimination and Refusal to Make Reasonable Accommodation to Disability Limitations Thereby Denying Equal Access to Half This Country's Private Sector Jobs.

Amici organizations collectively represent directly and indirectly over ten million persons in the United States with disabilities. A key concern of the organizations and their constituents is overcoming barriers to equal access to the mainstream of society including overcoming barriers to employment.

A significant segment of the six million persons with developmental disabilities has the potential for competitive employment. However, only 14 percent of the working age severely disabled population (which includes the developmentally disabled) and only 42 percent of the nonseverely disabled population are working compared with 74 percent of the non-disabled. Part of the discrepancy is attributable to the denial of equal employment opportunity, including the denial of the reasonable accommodation needed to accommodate to disability limitations. However, the Ninth Circuit's decision in *Fisher* denies Americans with disabilities the right to enforce Congress' promise of equal employment opportunity, as embodied in § 503 of the Rehabilitation Act, 29 U.S.C. § 793, and denies them access to employment with federal contractors, a group of the Department of Labor, OFCCP, estimates as providing 50% of this country's private sector jobs.

B. The Holding of the Ninth Circuit in *Fisher* Was Premised on an Interpretation of the Phrase "Affirmative Action" Which Conflicts With How That Phrase Was Interpreted by This Court in *Southeastern Community College v. Davis* and by Congress.

This Court in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979) contrasted the obligations imposed by §§ 501 and 503 on the one hand and § 504 on the other:

> "The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the even handed treatment of qualified handicapped persons [§ 504] and affirmative efforts to overcome the disabilities caused by handicaps [§§ 501 and 503]." *Id.*, 442 U.S. at 412, 99 S.Ct. at 2369.

This Court interpreted "affirmative action" as used in §§ 501 and 503 to mean "accommodation to the needs of a disabled person" or an obligation to make reasonable accommodation to the disabililty limitations of a disabled person. *Id.*, 442 U.S. at 415, 99 S.Ct. at 2370. This interpretation is consistent with Congress' interpretation of that term as reflected in the limitations imposed on the federal government's affirmative action obligation under § 501 of the Rehabilitation Act, 29 U.S.C. § 791, by the 1978 amendments:

> ". . . In fashioning an equitable or affirmative action remedy under such section [§ 501], a court may take into account the reasonableness of the cost of any necessary work place accommodation, or the availability of alternatives therefor or other appropriate relief. . . ." § 505(a)(1) of the Rehabilitation Act, 29 U.S.C. § 794a(a)(1).

Similarly, the Department of Labor has consistently interpreted "affirmative action" as used in § 503 as imposing both nondiscrimination and reasonable accommodation obligations on covered employees with respect to individual applicants and employees. 29 C.F.R. § 60-741.6(a)-(e) 1980)

The *Fisher* majority, however, failed to define the phrase "affirmative action" in terms of reasonable accommodation or special efforts to overcome disability limitations as has this Court. As a result of the *Fisher* majority's failure to look to *Southeastern Community College v. Davis* for guidance in interpreting the obligations imposed under § 503, the *Fisher* majority based its finding with respect to the second part of the test in *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975), on an erroneous premise — namely that the "affirmative action" protection in § 503 is not amenable to judicial enforcement and therefore Congress could not have intended for § 503 rights to be enforced in private actions. *Fisher v. City of Tucson, supra*, 663 F.2d at 864-65. In actuality federal courts have had substantial experience in applying the concept of reasonable accommodation to the facts in individual cases with respect to claims of employment discrimination because of a failure to make or attempt a reasonable accommodation to a religious practice. *E.g., Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977).

Further, the *Fisher* majority's finding with respect to the third part of the *Cort v. Ash* test — namely, whether private enforcement is consistent with the underlying purpose of the legislative scheme — is also premised on the majority's failure to understand what "affirmative action" means with respect to claims by alleged discriminatees. *Fisher v. City of Tucson, supra*, 663 F.2d at 866-67. The criteria and

method for evaluating Fisher's complaint would be the same judicially and administratively, assuming failure to hire was because of a handicapping condition:

> Whether the exclusion is justifiable because of job-related or business necessity reasons, and, if so, whether or not the employer is able to make reasonable accommodation to the otherwise disqualifying handicapping condition without undue hardship.

Therefore, a private remedy would be consistent with administrative enforcement of a § 503 and the underlying purpose of the legislative scheme.

C. Since *Fisher* Was Decided at the District Court Level and Appealed Before *Monell*, and at the Ninth Circuit Argued and Submitted More Than a Month Before *Maine v. Thiboutot*, the Question of Whether Private Suit Was Authorized Under 42 U.S.C. § 1983 Was Not Addressed Below. However, as in Last Term's *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers*, This May Be an Appropriate Case for Reaching the Question as a Subsidiary Question Fairly Included Within Petitioner Fisher's Statement of Questions Presented Should This Court Affirm the Judgment Below Under § 503 Alone.

The district court decision in this case issued November 23, 1977. The notice of appeal was therefore filed in early 1978 — well before this Court's June 6, 1978, opinion in *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), which held that municipal entities were "persons" within the meaning of 42 U.S.C. § 1983. The *Fisher* case was argued and submitted May 14, 1980 — more than a month before this Court's June 25, 1980, decision in *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555

(1980), which held that 42 U.S.C. § 1983 encompasses claims based on purely statutory violations of federal law. The criteria making it appropriate in *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981), to reach the question of the applicability of *Maine v. Thiboutot* is thus present in *Fisher*:

> "It is appropriate to reach the question of the applicability of *Maine v. Thiboutot* to this setting. Despite the failure of the respondents to raise it here or below. This case began long before that decision. Moreover, if controlling, this argument would obviate the need to consider whether Congress intended to authorize private suits to enforce these particularly federal statutes. The claim brought here arguably falls within the scope of *Maine v. Thiboutot* because it involves a suit by a private party claiming that a federal statute has been violated under color of state law, causing an injury." *Id.*, 453 U.S. at 19, 101 S.Ct. at 2626, 69 L.Ed.2d at 450.

This Court on other occasions has considered issues not addressed below, given exceptional circumstances. For instance, in *Boulden v. Holman*, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969), which came to the Court on a writ of habeus corpus on the voluntariness of a confession (with judgment below affirmed on this issue), the Court, pursuant to its opinion the prior term in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 22 L.Ed.2d 776 (1968), reached the issue of the exclusion of Jury members because of the capital punishment opinions. *Cf.*, *Procunier v. Navarette*, 434 U.S. 555, 560-61 n. 6, 98 S.Ct. 855, 858-59, 57 L.Ed.2d 202 (1978), "In any event, our power to decide is not limited by the precise terms of the question presented." *Blonder-Tongue Laboratories, Inc. v. University Foundation*, 402 U.S. 313, 320 n. 6, 91 S.Ct. 1434, 1438, 29 L.Ed.2d 788 (1971).

D. Whether 42 U.S.C. § 1983 Is an Alternative Source of Congressional Authorization of Private Suit Under § 503 of the Rehabilitation Act, 29 U.S.C. § 793, Where the Federal Contractor, as Here, Is a Municipal Governmental Entity, Is an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

This Court in *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), "held that 42 U.S.C. § 1983 provides a cause of action for state deprivations of any 'rights secured' by 'the laws' [of the United States]." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28, 101 S.Ct. 1531, 1545, 69 L.Ed.2d 694 (1981). In *Pennhurst* and in *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers*, 453 U.S. 1, 19, 101 S.Ct. 2615, 69 L.Ed.2d 450 (1981), this Court articulated a two-pronged test to determine whether 42 U.S.C. § 1983 may be an alternative source of Congressional authorization of private suit:

1. Whether the statute created or secured a substantive right.
2. Whether "Congress intended to foreclose implied private actions [and] also . . . intended to supplant any remedy that otherwise would be available under § 1983." *Middlesex Cty. Sewerage Authority v. Nat'l Sea Clammers, supra*, 453 U.S. at 21, 101 S.Ct. at 2627.

The court below found § 503 "creates a federal right on behalf of the protected class" of handicapped persons. *Fisher v. City of Tucson, supra*, 663 F.2d at 863. Therefore the first prong of the test is met.[1]

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[1]This holding is admittedly contrary to holdings in other circuits which found that § 503 does not confer a right in favor of handicapped individuals. *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1079-80 (5th Cir.), *cert. denied*, 449 U.S. 889, 101 S.Ct. 246, 66 L.Ed.2d 115 (1980); *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1239-40 (7th Cir. 1980); *Davis v. United Airlines*, 662 F.2d 120, 122-123 (2d Cir. 1981). *See also Fisher v. City of Tucson, supra*, 663 F.2d at 863 and (dissent) 868 and n. 1.

The second prong of the test differs from the second part of the test in *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975), as articulated by the *Fisher* majority below. The Ninth Circuit found that "Congress did not intend to create a private right of action to enforce section 503." *Fisher v. City of Tucson, supra*, 663 F.2d at 865. The test for foreclosing a remedy under 42 U.S.C. § 1983, however, requires more than a finding that Congress did not intend to create a private right of action: A remedy under § 1983 is available to a handicapped individual *unless* there is a showing that Congress intended to *foreclose* an implied private action, and, further and additionally, intended to *supplant* any remedy under § 1983. Such a conclusion cannot be drawn from the majority opinion below and, *Amici* submit, could not be drawn from the language of the statute or the legislative history surrounding § 503 and the Rehabilitation Act and subsequent amendments.[2]

E. Should This Court Not Grant Certiorari to Consider the Question of the Private Right of Action Under § 503, *Amici* Respectfully Suggest That This May Be an Appropriate Case for Summary Disposition — Namely, to Vacate the Decision Below and Remand for Reconsideration in Light of *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers*, *Pennhurst State School and Hospital v. Halderman*, and *Maine v. Thiboutot*.

The grounds for urging consideration of the question of whether § 1983 is an alternative source of Congressional authorization of private suit under § 503 of the Rehabili-

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[2]Judge Oakes of the Second Circuit writing for a divided court in *Davis v. United Airlines*, 662 F.2d 120, 127 (2d Cir. 1981): "But we conclude, as have the other three courts of appeals that have passed upon the question, that no implied private right of action exists under section 503, *recognizing that the glass through which we see is by no means crystal clear but is so cloudy as to be barely translucent.*" (emphasis added.)

tation Act, 29 U.S.C. § 793, should this Court find there is no private right of action under § 503, are also the grounds making summary disposition of this case appropriate. *See Youakim v. Miller*, 425 U.S. 231, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976), in which this Court in a *per curiam* decision remanded the case for consideration of the Supremacy Clause question of whether the state statute conflicted with the Social Security Act even though the issue had not been raised or addressed below.

Conclusion.

For the reasons set forth above, *Amici* submit that this is an appropriate case for granting the petition for writ of certiorari.

Dated: June 18, 1982.

Respectfully submitted,

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